STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-756-H PERB Decision No. 1751-H February 8, 2005

Appearances: Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for Academic Professionals of California; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Academic Professionals of California (APC) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally adopting and implementing a workplace violence prevention policy and guidelines.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, APC's appeal and CSU's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

[1]HEERA is codified at Government Code section 3560, et seq.

DISCUSSION

No change in policy or practice

This matter involves an Affirmative Action and Non-Discrimination Policy (Policy) adopted by CSU in 1997. At issue here is the portion of the Policy that sets forth the procedures to be followed by a student wishing to file a discrimination complaint. The Policy also provides that information gathered during the investigation of a student complaint may lead to discipline of represented employees. However, the Policy expressly provides that where discipline is brought against a represented employee, the disciplinary procedures contained in any applicable collective bargaining agreement (CBA) apply.

The Board agent dismissed the charge on the grounds that the Policy was not a matter within the scope of representation because it applied only to students. As discussed below, I agree.

As alleged in the charge, the Policy merely sets forth CSU's prohibition against discrimination and/or harassment of students. Surely, APC is not alleging that prior to 1997 its bargaining unit members could lawfully discriminate against students. To the contrary, discrimination against students on the basis of such categories as sex and race has long been prohibited by law. (See, e.g., 42 U.S.C. § 2000d et seq. (Title VI of the Civil Rights Act of 1964).) As such, CSU's Policy, in part, does nothing more than notify students and employees of existing legal mandates. (See Trustees of the California State University (Stanislaus) (2004) PERB Decision No. 1705-H (CSU (Stanislaus)).)

In addition to prohibiting discrimination, the Policy also sets forth complaint procedures. APC argues that these procedures also constitute a change in policy or practice. However, on its face, I believe, the complaint procedures only apply to student complaints. APC attempts to circumvent this defect in its theory by pointing out that the Policy now

requires represented employees to cooperate with the investigation of a student complaint. Further, APC takes issue with the fact that the Policy does not expressly state that employees have the right to representation during investigatory interviews. As both these arguments have been rejected in the past, it should not be surprising that they are rejected again. (See Trustees of the California State University (2004) PERB Decision No. 1658-H (Trustees).)

In Trustees, APC made almost identical arguments in challenging a whistleblower policy issued by CSU. Responding to APC's argument that requiring unit members to cooperate with an investigation constitutes a change in policy or practice, the Board held that:

> Whether under the new of the old policy, it is presumed that an employee should participate by cooperating and giving honest answers [during an investigation].

Likewise, the Board rejected APC's argument that the policy should expressly inform employees of their right to representation. On that issue, the Board held that there was no legal requirement that an employer expressly notify employees of their representational rights. Thus, the lack of notice of such rights by an employer cannot be interpreted as a denial of such rights. Accordingly, APC has failed to demonstrate that there has been a change in policy or practice.

Scope of Representation

Even if APC could establish a change in policy or practice, I believe that the Policy at issue is not within the scope of representation. In discussing this issue, it is helpful to analyze the various components of the Policy separately. Specifically, the Policy contains three separate parts: (1) a non-discrimination mandate; (2) procedures for the filing of complaints; and (3) procedures for imposing discipline. Each of these components will be addressed in turn.

Non-Discrimination Mandate

First and foremost, the Policy prohibits discrimination against students on the basis of race, sex, and other protected categories. By the plain language of the Policy, this mandate applies to employees within APC's bargaining unit. Had this rule of conduct been imposed by CSU, it is undisputed that it would be within the scope of representation. (San Bernardino City Unified School District (1982) PERB Decision No. 255 (San Bernardino).)

However, as already noted, this mandate was not imposed by CSU, but rather by governmental statute. In adopting the Policy, CSU has done nothing more than notify employees of this statutory mandate. Accordingly, the non-discrimination portion of the Policy is not within the scope of bargaining. (See CSU (Stanislaus).')

Procedures for Filing Complaints

In addition to the non-discrimination mandate, the Policy also contains procedures for the filing of discrimination complaints. APC compares this situation to that in Trustees of the California State University (2001) PERB Decision No. 1451-H (policy requiring employees to wear name tags) and Trustees of the California State University (2003) PERB Decision No. 1507-H (policy on employee use of computers, fax machines, electronic mail and telephones). In both those cases, the Board found the policies at issue to be within the scope of representation.

However, APC fails to acknowledge that in all the cases it cites, the policies at issue were applicable to employees, or more precisely, to bargaining unit members. In contrast, the complaint procedures contained in the Policy here only apply to students and other non-represented employees. Thus, the cases cited by APC are inapposite.

Since the complaint procedures in the Policy do not apply to APC bargaining unit members, the Board agent correctly analyzed this case under Compton Community College

District (1990) PERB Decision No. 798 (Compton). Compton involved the negotiability of a similar policy applicable to non-represented employees. The Compton case recognizes that the scope of representation under HEERA is generally limited to wages, hours and other terms and conditions of employment. Thus, to be negotiable, there must be some relationship between the subject matter and the conditions of employment. (See Anaheim Union High School District (1981) PERB Decision No. 177.)

In Compton, the Board found such a relationship because the policy allowed the placement of negative information into an employee's personnel file. In contrast, the Policy here does not provide that the results of an investigation can be placed in an employee's personnel file.[2] Without such an action, it is difficult to see how the mere filing and investigation of a student complaint affects the terms and conditions of employment for bargaining unit employees. Since there is no effect on the terms and conditions of employment, the Board agent correctly found the complaint procedures not to be within the scope of representation.

Procedures for Imposing Discipline

Finally, the Policy provides that facts and findings made during an investigation may lead to discipline against employees. It is well-settled that disciplinary procedures are within the scope of representation. (San Bernardino.) Thus, to the extent the Policy sets forth disciplinary procedures for bargaining unit employees, it is negotiable.

However, as noted above, there has been no change in past practice or policy. Specifically, the Policy expressly states that:

> If the University pursues disciplinary action against an alleged violator, Title V, HEERA or the appropriate Collective Bargaining Agreement will govern if a hearing is required.

[2]As discussed below, even though disciplinary action may result from an investigation, the Policy clearly provides that such disciplinary actions will comply with applicable CBA provisions.

Thus, even though disciplinary procedures are within scope, APC's charge still fails because it has not established any change.

Rules of Conduct Versus Grounds for Discipline

Finally, it is necessary to address the arguments made by Member Whitehead's concurrence. The concurrence argues that even though the Policy primarily applies to students, it is negotiable because it creates another "grounds for discipline." I disagree.

In discussing this issue, it is important to note that both Member Whitehead and I agree that rules of conduct are within the scope of representation. (See San Bernardino.) Indeed, all the relevant cases cited by his concurrence involve new rules of conduct imposed by the employer upon employees. (See, e.g., Trustees of the California State University, supra, PERB Decision No. 1451-H (policy requiring employees to wear name tags) and Trustees of the California State University, supra, PERB Decision No. 1507-H (policy on employee use of computers, fax machines, electronic mail and telephones). Those cases, however, are inapposite to the situation here. In this case, the rule of conduct was not imposed by the employer, but rather by statutory mandate. As the Board recently held, where the rule of conduct is imposed by statute, it is not within the scope of representation. (See CSU (Stanislaus).)

Member Whitehead's concurrence argues that even where a rule of conduct is imposed by statute, the employer must still negotiate over whether the rule constitutes a ground for discipline. In other words, his concurrence argues that an employer must first negotiate a work rule, then negotiate whether the employer can discipline an employee for violating the rule. Such a holding would be untenable.

I believe that it is axiomatic that violating a work rule can lead to discipline. Otherwise, they would not be work rules but rather "suggestions." Under his concurrence,

every employer would conceivably have to negotiate over the hundreds, if not thousands, of civil and penal statutes governing the behavior of individuals at work. For example, imagine that an employee is convicted of embezzling from his/her employer. I do not believe that the employer must negotiate whether it can discipline an employee for criminal embezzlement. Similarly, where the law prohibits discrimination I do not believe an employer must negotiate over whether it can discipline an employee for violating the law.

ORDER

The unfair practice charge in Case No. LA-CE-756-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Whitehead's concurrence begins on page 8.

Member Shek's concurrence begins on page 16.

WHITEHEAD, Member, concurring: I concur with the lead opinion but respectfully disagree with the reasoning. For the reasons which follow, I have concluded that the unfair practice charge should be dismissed for the sole reason that there was no unilateral change in policy.

The charge, as amended, alleges that the parties' collective bargaining agreement (CBA) expired on June 30, 2003 and the parties are involved in negotiations for a successor agreement. On September 6, 2002, CSU Sonoma State (CSU) issued a proposed non-discrimination policy to the Academic Professionals of California (APC) for comment. This draft policy revises and supercedes a very similar policy that was last revised on August 5, 1997. APC states that it was unaware of the previous policy. On November 4, 2002, APC wrote a letter to CSU asking for a copy of the policy, which the proposed policy replaced. CSU provided the August 1997 policy but could not find evidence of notice to APC of the previous policy. On November 25, 2002, APC requested evidence of notice of the previous policy but CSU responded that this information was irrelevant and untimely. On December 13, 2002, APC wrote to CSU requesting that both policies be rescinded. APC asserted that the policy falls within the scope of representation under the reasoning in Trustees of the California State University (2001) PERB Decision No. 1451-H, in which the employer required the employees to wear name tags.

CSU filed a response. In the response, it contends that the 1997 policy was consistent with the parties' CBA. It cites specifically Article 21, the non-discrimination provision, which sets forth CSU's non-discrimination procedure and a policy for handling discrimination complaints from employees and students. Unit employee complaints are handled under the grievance procedure set forth in Executive Order 419. Executive Order 419 is a discrimination complaint resolution process, which provides in section I.B. that "should findings be made of intentional discrimination on the part of any employee, appropriate disciplinary action shall be

taken under the direction of the President." Section 21.1 suggests that employees utilize the complaint/grievance procedures outlined in the CBA.

The Board agent, in dismissing the charge, found that the policy was not within scope, citing Compton Community College District (1990) PERB Decision No. 798 (Compton). In Compton, a student grievance policy was deemed to be within scope because the student complaints are placed in the employee's personnel file. There was no evidence of such practice in the instant matter. The Board agent also found no negotiable disciplinary impact since discipline must follow CBA guidelines. In so finding, the Board agent alludes to a zipper clause, but finds it inapplicable as the policy is not within scope.[1] The Board agent also dismissed APC's argument that the policies do not allow for union representation during disciplinary procedures because the policies involve student complaints against employees. The CBA provides for union representation during employee disciplinary procedures.[2] Finally, the Board agent found that the policy did not establish a new work rule since discriminatory conduct has been considered unlawful and unprofessional under Education Code section 89535, which pertains to CSU employees.[3]

APC alleges that CSU unilaterally implemented the two non-discrimination policies without negotiating. In determining whether a party has violated HEERA section 3571(c)[4], PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific

[1]The zipper clause is not in the record. The Board agent cited at least three CBA provisions that are not contained in the record and only titles of sections are listed in the attached CBA tables of contents.

[2]These sections were not included in the record.

[3]Whether discrimination in all its aspects is deemed to be unprofessional conduct is not clear. See however, Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151 [213 Cal. Rptr. 53], review denied.

[4]HEERA is codified at Government Code section 3560, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

I find the policy to fall within the scope of representation because it creates a "cause" for discipline. The reasoning below quotes liberally from this office's dissent in Trustees of the California State University (Stanislaus) (2004) PERB Decision No. 1705-H involving the same parties.

In San Bernardino City Unified School District (1982) PERB Decision No. 255 (San Bernardino I), the Board held that causes of discipline as well as procedures for discipline are negotiable items. Significantly, the Board made this finding despite the fact that soon after the issuance of San Bernardino I, Educational Employment Relations Act (EERA)[5] section 3543.2 was amended to expressly include causes of discipline within the scope of representation. (EERA sec. 3543.2(b).) In fact, in Monrovia Unified School District (1984) PERB Decision No. 460 (Monrovia'), the Board held that this amendment to EERA Section 3543.2(b) did not suggest that the subject was previously outside of scope. Quoting Arvin Union School District (1983) PERB Decision No. 300, the Monrovia Board affirmed that:

> 'The addition of a new enumerated subject to the scope section doesn't mean such a subject was not previously related to an enumerated item. The change in the law means that the negotiability of specific procedures for disciplinary action arising after January 1, 1982 no longer need be analyzed in terms of the

[5]EERA is codified at Government Code section 3540, et seq.

> Anaheim balancing test.'
> (Emphasis in text.)[6]

Education Code section 89535 does not restrict the bases for discipline.[7] To my knowledge, the Board has never held that because a statute defines causes of discipline, that other causes of discipline or variations of the specified causes are not negotiable.[8] On the contrary, over the years, the Board has attempted to expand those causes that are subject to negotiation using the Education Code provisions to be a baseline for negotiations under EERA and HEERA. As stated by the Board in Trustees of the California State University (2003) PERB Decision No. 1507-H (Trustees):

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[6]In United Steelworkers of America v. Board of Education (1984) 162 Cal.App.3d 823, 831 [209 Cal.Rptr. 16], the court noted that the San Bernardino I cause of action arose before the 1981 amendment to EERA section 3543.2, which included causes and procedures for disciplinary action of certificated employees as a negotiable issue. It found that nevertheless, the Board's reasoning, based on the Anaheim test (Anaheim Union High School District (1981) PERB Decision No. 177), was good law to the extent it was not inconsistent with EERA or the Education Code.

[7]Education Code section 89535 provides:

> Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes:
>
> (a) Immoral conduct.
> (b) Unprofessional conduct.
> (c) Dishonesty.
> (d) Incompetency.
> (e) Addiction to the use of controlled substances.
> (f) Failure or refusal to perform the normal and reasonable duties of the position.
> (g) Conviction of a felony or conviction of any misdemeanor involving moral turpitude.
> (h) Fraud in securing appointment,
> (i) Drunkenness on duty.

[8]The California Supreme Court in San Mateo City School Dist, v. Public Employment Relations Bd. (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800] (San Mateo) rejected the notion that the scope of negotiations is strictly limited to items enumerated in EERA and expressly disavowed the district's contention to that effect. (See San Mateo, at pp. 862-863, 866.)

> [A]s correctly stated by the ALJ, the absence of Education Code section 89535 from HEERA section 3572.5 does not preclude the parties from negotiating forms and bases for discipline not included within section 89535, provided that the subject is related to wages, hours or other negotiable terms and conditions of employment.[9]

Unlike EERA section 3543.2, HEERA section 3562(r) does not list items within scope; rather, it serves to exclude specific items. Discipline is not one of the excluded items. In fact, under that provision, "scope of representation" is specifically defined as items limited to "wages, hours of employment, and other terms and conditions of employment." Thus, the definition of scope in HEERA is more expansive than that of EERA, which specifically defines terms and conditions of employment.

Appellate courts have held that items covered by the Education Code continue to be negotiable unless the proposed contractual provisions would supplant or nullify the pertinent provisions of the Education Code. In San Mateo, the school districts argued that the language in EERA section 3540 pertaining to the relationship between EERA and the Education Code evidenced a Legislative intent to narrowly restrict the scope of representation. The Board, on the other hand, had interpreted this language to prohibit negotiations only where the provisions of the Education Code would be "replaced, set aside or annulled by the language of the proposed contract clause." (Id, at p. 864.) In San Mateo, at pp. 864-865, the California Supreme Court enunciated the standard for negotiability in these circumstances:

> In the words of board member Moore, 'Unless the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded.' (Cit.)
>
> PERB's interpretation reasonably construes the particular language of section 3540 in harmony with the evident legislative

[9] In Trustees, the parties had negotiated provisions for discipline based on specified causes. Some of these causes were not among the enumerated bases for discipline in Education Code section 89535.

> intent of the EERA and with existing sections of the Education Code. This, rather than the preemption theory offered by the Healdsburg Districts, is the correct approach when several provisions of state law address a similar subject. (Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 723 [166 Cal.Rptr. 331, 613 P.2d 579]; Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist. (1974) 42 Cal.App.3d 328 [116 Cal.Rptr. 819].) It is consistent with the fact that the EERA explicitly includes matters such as leave, transfer and reassignment policies within the scope of representation, even though such matters are also regulated by Education Code. (See, Ed. Code § 44963 et seq. [pertaining to certificated employees] and § 45105 et seq. [pertaining to classified employees].) (Emphasis added.)

The court thus approved of the Board's interpretation of the supersession language in EERA section 3540:

> PERB's approach is consistent with judicial interpretations of substantially similar language which appeared in the Winton Act.[10] In Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist., supra, 42 Cal.App.3d 328, the Court of Appeal held it permissible for a school district to meet and confer on matters such as tenure notwithstanding the fact the matters were regulated by the Education Code. The court explained that its holding harmonized sections of the Education Code bearing on the same general subject and effectuated the purpose of strengthening existing tenure rules by promoting orderly and uniform communication between teachers and administrators. (Id, at pp. 333-335.)
>
> PERB's approach is also consistent with the approach taken by the Court of Appeal in Sonoma County Bd. of Education v. Public Employment Relations Bd. (1980) 102 Cal.App.3d 689 [163 Cal.Rptr. 464]. There school employees sought to negotiate wages for individual job classifications. Although Education Code section 45268 forbids salary changes which effectively 'disturb the relationship which compensation schedules bear to one another,' the court held negotiation of salary adjustments for individual job classifications permissible provided that the

[10] Former Education Code section 13080 provided: 'Nothing contained herein shall be deemed to supersede other provisions of this code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations.'"

> relationship between positions established by the personnel commission remained intact. (Ibid.)

Other PERB decisions have applied the San Mateo test and held discipline to be a negotiable subject. See, e.g., San Bernardino City Unified School District (1998) PERB Decision No. 1270 (San Bernardino II), in which sick leave review policies were held to be within scope. The Board in San Bernardino II, citing San Bernardino I. affirmed that "rules of conduct which subject employees to disciplinary action are subject to negotiation . . . both as to criteria for discipline and as to procedure to be followed." In Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375 (Healdsburg), the Board on remand from San Mateo noted that the Board has applied the San Mateo test in numerous cases since San Mateo City School District (1980) PERB Decision No. 129 and Healdsburg Union High School District and Healdsburg Union School District (1980) PERB Decision No. 132, the original Board decisions at issue in San Mateo.[11]

In this case, to the extent that violation of the two policies creates a cause for discipline for unit members, these policies fall within the scope of representation.[12] In addition, to the extent that these policies create a discrimination complaint procedure for unit employees, that issue also is negotiable. (Healdsburg.)

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[11]Footnote 3. page 7 of Healdsburg refers to Jefferson School District (1980) PERB Decision No. 133; North Sacramento School District (1981) PERB Decision No. 193; Holtville Unified School District (1982) PERB Decision No. 250; Calexico Unified School District (1982) PERB Decision No. 265 and Mt. San Antonio Community College District (1983) PERB Decision No. 297.

[12]The lead opinion states that the policies were imposed by statutory mandate, not by the employer; yet, I can find no authority that requires discipline of employees who violate these statutes. On the contrary, in this matter, it is the employer who is imposing discipline for violation of the policy.

Under San Juan Unified School District (1977) EERB Decision No. 12 ("San Juan")[13] and Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains), in determining whether a charging party has stated a prima facie case, we must assume the facts asserted by the charging party to be true. At this stage of Board proceedings, any dispute over the facts must be decided in favor of the charging party. (San Juan; Golden Plains.) APC alleges that it did not learn of the 1997 policy until it received knowledge of the proposed draft policy in 2002. We would therefore find the allegations as to both policies to be timely.

I agree with the lead opinion that the policies, as they pertain to items within scope, do not comprise a unilateral change in policy, but not for the reasons stated. The lead opinion bases its conclusion on the premise that the policies are a mere notification to students and employees of existing legal mandates. However, I find no change in policy because the policies are consistent with existing provisions of CBA Article 21 and Executive Order 419, whose procedures were incorporated by reference in Article 21. I therefore find that there was no change in policy and would dismiss the charge accordingly.

[13]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

SHEK, Member, concurring: To establish an unlawful unilateral change, the charging party must establish that: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.) I agree with the lead opinion that there has been no change in the terms and conditions of employment and would dismiss the unfair practice charge based on that ground only. As there has been no change, I see no need to discuss the scope of representation. On that basis, I do not join in the portion of the lead opinion discussing the scope of representation nor would I adopt the portion of the warning and dismissal letters discussing that issue.

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 24, 2003

Lee O. Norris, Labor Relations Representative
Academic Professionals of California
8726D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-756-H; First Amended Charge
DISMISSAL LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 21, 2003. The Academic Professionals of California alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally implementing a non-discrimination policy for employees and students at Sonoma State University.[2]

I indicated to you in my attached letter dated July 31, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to August 7, 2003, the charge would be dismissed.

I later extended this deadline to August 15, 2003. On August 18, 2003, Charging Party filed a first amended charge. Attached to the amended charge is a letter which suggests that analyzing the non-discrimination policy under the test provided by the Board in California State University (2001) PERB Decision No. 1451-H would render the non-discrimination clause negotiable.

The relevant facts are as follows.

APC and CSU are parties to a collective bargaining agreement which expired on June 30, 2003. Article 12 of the Agreement contains a detailed discipline procedure which applies to all

[1] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] This charge is substantially similar to Unfair Practice Charge No. LA-CE-721-H, which was dismissed on July 16, 2003.

discipline contemplated by CSU. With regard to Non-Discrimination, Article 21 states in relevant part:

> 21.1 It is the policy of the CSU to prohibit discrimination against bargaining unit employees on the basis of race, color, religion, national origin, sex, sexual orientation, marital status, pregnancy, age, disability, or veteran's status. Any allegations by an employee that he/she has been the victim of such discrimination shall be adjudicated solely under the grievance procedure provided in Executive Order No. 419 as hereby amended in this Article.
>
> 21.3: A written report of the outcomes of the advisory fact-finding investigation shall be sent to the Office of the Chancellor and to the complainant. The advisory fact-finding report will be considered in the determination of the Level III complaint.

Executive Order 419 provides, in pertinent part, as follows:

> I. Introduction
>
> B. The California State University pledges to encourage the equitable and prompt settlement of complaints which may be raised by any employee on a claim of discrimination based on any of the protected categories listed as part of the Board of Trustees Policy on Nondiscrimination and Affirmative Action. Should discrimination be found to exist in any employment action within the California State University, all appropriate measures will be undertaken. Furthermore, should findings be made of intentional discrimination on the part of any employee, appropriate disciplinary action shall be taken under the discretion of the President.
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> * * * * *
>
> V. Informal Level (Optional)
>
> A. Prior to the filing of a formal complaint, under Section IV of these procedures, an individual or individuals may seek the advice and counsel of the campus Affirmative Action Coodinator in an informal meeting to determine the nature of any claim of discriminatory practices and to facilitate an expeditious resolution of the complaint.. .
>
> B. An employee shall also have the right to present a potential complaint and to have that potential complaint considered in good faith. The employee and representative, if any, shall discuss the potential complaint with the appropriate

> administrator no later than thirty-five (35) days after the event giving rise to the potential complaint. ..

In 1997, the University adopted an Affirmative Action and Non-Discrimination Policy for students who believed they were discriminated against by University employees or fellow students. The Policy provided specific steps for the resolution of complaints made by students. With regard to employee complaints of discrimination, the Policy specifically states:

> Employees and students, who believe they have been subjected to discrimination and/or sexual harassment, including sexual assault, have options available to resolve concerns of discrimination and/or sexual assault. Staff and faculty members can utilize the complaint/grievance procedures outlined in their Collective Bargaining Agreements (CBA), and/or file a complaint with the appropriate external governmental agency.

With regard to discipline, the 1997 Policy provides as follows:

> Facts gathered and any findings made during an informal resolution or formal complaint process may be sufficient to obligate the University to take disciplinary action against a faculty member, staff member or student, or for the University to initiate a criminal investigation. If the University pursues disciplinary action against an alleged violator, Title V, HEERA or the appropriate Collective Bargaining Agreement will govern if a hearing is required.

On September 6, 2002, the University sent a copy of a Draft Non-Discrimination Policy to all CSU organizations, including APC. The Draft Policy was accompanied by a cover letter from the University, requesting that any concerns or questions be addressed to CSU Labor Relations Manager Joel Block. APC did not respond to the Draft Policy. The Draft Policy is substantially similar to the 1997 policy and does not add any additional requirements.

On October 30, 2002, the University again notified APC of its intent to implement the Draft Policy on November 15, 2002. On November 4, 2002, APC representative Lee Norris requested additional information, including a copy of the 1997 Policy. On November 25, 2002, Mr. Norris sent another letter to the University asking (1) how claims of discrimination would be investigated and (2) for the 1996 letter that notified APC of the 1997 Discrimination Policy.

On December 12, 2002, the University informed Mr. Norris that employee misconduct would be investigated pursuant to the terms in the collective bargaining agreement. Additionally, the

University stated it could not locate the 1996 letter.[3] On December 13, 2002, Mr. Norris demanded the Draft Policy not be implemented until the University had fulfilled its bargaining obligation with APC. The University has not implemented the Draft Policy.

Based on the above stated facts, and those provided in the original charge, the allegations still fail to state a prima facie case, as the matter is not within the scope of representation.

Initially, as in the original charge, APC contends the University is seeking to regulate off campus activity. My warning letter noted that nothing in the draft agreement addressed such conduct and that APC failed to provide support for the contention that employees have been allowed to discriminate against students while engaged in off-campus activities. The amended charge does not provide any of the requested additional facts and does not demonstrate that the Draft Policy even applies to off campus conduct. As such, this allegation must be dismissed.

APC contends the CSU violated the HEERA when it unilaterally adopted the 1997 Policy and the Draft Discrimination Policy. However, the charge fails to demonstrate the first prong of the test for unilateral change; that the decision to adopt the policy is within the scope of representation. It is undisputed that policies that protect employees from unlawful discrimination are within the scope of representation. (See, Jefferson School District (1980) PERB Decision No. 133; San Mateo City School District (1984) PERB Decision No. 375.) However, this policy does not serve to protect employees from discrimination, but seeks to protect student and unrepresented employees. As such, the above cited cases are inapplicable.

APC suggests that applying the Board's test in California State University (2001) PERB Decision No. 1451-H, will demonstrate that the Draft Policy is within the scope of representation. In that decision, the Board found that requiring employees to wear name tags was within the scope of representation. In so holding, the ALJ noted that he applied a test parallel to the test applied in Anaheim Union High School District (1981) PERB Decision No. 177. Additionally, the ALJ noted that neither party was able to find PERB or private sector case law on the issue, thus rendering the issue one of first impression.

Such is not the case herein, In Compton Community College District (1990) PERB Decision No. 798, PERB addressed public and student complaints against bargaining unit members. In Compton, the district unilaterally adopted a student grievance policy that allowed students to file complaints against certificated employees. The outcome of these complaints were placed in the employees' personnel file. In finding that the complaint procedure was within the scope of representation "because it sets up a procedure whereby an employee's performance in a particular situation is evaluated" the Board further held:

> That we based this finding on the policy's requirement that student complaints and/or administrative determinations resulting

[3] The 1997 Policy is included in employee and student handbooks, and is located on the University's website.

> from student complaints are placed in the personnel file of the employee charged. (Id at 3.)

As such, in order for the Discrimination Policy to be a negotiable subject under Compton, the initial complaint and/or administrative determination must be placed in the employee's personnel file. Without such action, it cannot be said that an employee's performance will be evaluated. A review of the 1997 Policy and the Draft Discrimination Policy indicates that the complaint and corrective action plan remain confidential. There is no mention of such complaints being placed in the personnel file. Moreover, Article 11 of the MOU contains a detailed provision regarding the placement of materials in an employee's personnel file. Additionally, there is no indication that the policy in any way supercedes the MOU. In fact, the policy requires any discipline be meted out in accordance with the MOU. Therefore, under the Compton analysis, the student policy fails to state a prima facie violation of the HEERA.

Although not raised by APC, the union could also argue that because the student discrimination policy could result in discipline to a bargaining unit member, the policy is a negotiable subject. It is again undisputed that disciplinary procedures and policies are within the scope of negotiation. (Arvin Union School District (1983) PERB Decision No. 300.) Indeed, the parties have already negotiated a comprehensive progressive discipline policy that governs actions from written and oral reprimands, to suspension and dismissal. (Article 12 of the MOU.)

While the adoption of a federally mandated policy may not be negotiable, the impact of the procedure may be negotiable. However, the charge fails to present any negotiable disciplinary impact.[4] The 1997 Policy and the Draft Discrimination Policy state any and all discipline arising from the policy will follow contractual guidelines. Moreover, the policy does not subject employees to a new work rule, as discriminatory conduct has been considered unlawful and unprofessional under Education Code 89535 which pertains to CSU employees.[5] As such, the adoption of the Discrimination Policy does not violate the HEERA.

Finally, APC contends the two policies do not provide for employee representation, and thus violate the HEERA. However, as the policy applies to student complaints against employees, the policy is silent with regard to employee representation. However, Article 12.3 and Article 10.1 of the MOU specifically provide for union representation during disciplinary procedures.

---

[4] The MOU contains a contractual zipper clause prohibiting CSU from implementing a new policy. However, that prohibition is limited to policies within the scope of bargaining. As this policy is not within scope, the zipper clause is inapplicable.

[5] Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes: (a) humoral conduct. (b) Unprofessional conduct. (c) Dishonesty. (d) Incompetency. (e) Addiction to the use of controlled substances. (f) Failure or refusal to perform the normal and reasonable duties of the position. (g) Conviction of a felony or conviction of any misdemeanor involving moral turpitude., (h) Fraud in securing appointment. (i) Drunkenness on duty.

As such, the policy's failure to mention employee representation does not constitute a unilateral change.

Right to Appeal

Pursuant to PERB Regulations,[6] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered

[6] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By, _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: [***]

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax:(510)622-1027

July 31,2003

Lee O. Norris, LR Representative
Academic Professionals of California
8726-D S. Sepulveda Blvd., #C172
Los Angeles, CA 90045

Re: Academic Professionals of California v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-756-H
WARNING LETTER

Dear Mr. Norris:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 21, 2003. The Academic Professionals of California alleges that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally implementing a non-discrimination policy for employees and students at Sonoma State University.[2]

Investigation of the charge revealed the following. APC and CSU are parties to a collective bargaining agreement which expired on June 30, 2003. Article 12 of the Agreement contains a detailed discipline procedure which applies to all discipline contemplated by CSU. With regard to Non-Discrimination, Article 21 states in relevant part:

> 21.1 It is the policy of the CSU to prohibit discrimination against bargaining unit employees on the basis of race, color, religion, national origin, sex, sexual orientation, marital status, pregnancy, age, disability, or veteran's status. Any allegations by an employee that he/she has been the victim of such discrimination shall be adjudicated solely under the grievance procedure provided in Executive Order No. 419 as hereby amended in this Article.
>
> 21.3: A written report of the outcomes of the advisory fact-finding investigation shall be sent to the Office of the Chancellor

[1] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] This charge is substantially similar to Unfair Practice Charge No. LA-CE-721-H, which was dismissed on July 16, 2003.

and to the complainant. The advisory fact-finding report will be considered in the determination of the Level III complaint.

Executive Order 419 provides, in pertinent part, as follows:

> I. Introduction
>
> B. The California State University pledges to encourage the equitable and prompt settlement of complaints which may be raised by any employee on a claim of discrimination based on any of the protected categories listed as part of the Board of Trustees Policy on Nondiscrimination and Affirmative Action. Should discrimination be found to exist in any employment action within the California State University, all appropriate measures will be undertaken. Furthermore, should findings be made of intentional discrimination on the part of any employee, appropriate disciplinary action shall be taken under the discretion of the President.
>
> * * * * *
>
> V. Informal Level (Optional)
>
> A. Prior to the filing of a formal complaint, under Section IV of these procedures, an individual or individuals may seek the advice and counsel of the campus Affirmative Action Coodinator in an informal meeting to determine the nature of any claim of discriminatory practices and to facilitate an expeditious resolution of the complaint...
>
> B. An employee shall also have the right to present a potential complaint and to have that potential complaint considered in good faith. The employee and representative, if any, shall discuss the potential complaint with the appropriate administrator no later than thirty-five (35) days after the event giving rise to the potential complaint...

In 1997, the University adopted an Affirmative Action and Non-Discrimination Policy for students who believed they were discriminated against by University employees or fellow students. The Policy provided specific steps for the resolution of complaints made by students. With regard to employee complaints of discrimination, the Policy specifically states:

> Employees and students, who believe they have been subjected to discrimination and/or sexual harassment, including sexual assault, have options available to resolve concerns of discrimination and/or sexual assault. Staff and faculty members can utilize the complaint/grievance procedures outlined in their Collective

> Bargaining Agreements (CBA), and/or file a complaint with the appropriate external governmental agency.

With regard to discipline, the 1997 Policy provides as follows:

> Facts gathered and any findings made during an informal resolution or formal complaint process may be sufficient to obligate the University to take disciplinary action against a faculty member, staff member or student, or for the University to initiate a criminal investigation. If the University pursues disciplinary action against an alleged violator, Title V, HEERA or the appropriate Collective Bargaining Agreement will govern if a hearing is required.

On September 6, 2002, the University sent a copy of a Draft Non-Discrimination Policy to all CSU organizations, including APC. The Draft Policy was accompanied by a cover letter from the University, requesting that any concerns or questions be addressed to CSU Labor Relations Manager Joel Block. APC did not respond to the Draft Policy. The Draft Policy is substantially similar to the 1997 policy and does not add any additional requirements.

On October 30, 2002, the University again notified APC of its intent to implement the Draft Policy on November 15, 2002. On November 4, 2002, APC representative Lee Norris requested additional information, including a copy of the 1997 Policy. On November 25, 2002, Mr. Norris sent another letter to the University asking (1) how claims of discrimination would be investigated and (2) for the 1996 letter that notified APC of the 1997 Discrimination Policy.

On December 12, 2002, the University informed Mr. Norris that employee misconduct would be investigated pursuant to the terms in the collective bargaining agreement. Additionally, the University stated it could not locate the 1996 letter.[3] On December 13, 2002, Mr. Norris demanded the Draft Policy not be implemented until the University had fulfilled its bargaining obligation with APC. The University has not implemented the Draft Policy.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the HEERA, for the reasons provided below.

APC makes several allegations regarding the 1997 Policy and the Draft Policy. Specifically, APC contends the 1997 Policy does not allow for employee representation and subjects employees to potential discipline. With regard to the Draft Policy, APC contends the University may not require employees to act in accordance with the non-discrimination policy

[3] The 1997 Policy is included in employee and student handbooks, and is located on the University's website.

when engaged in University-related activities off campus.[4] Additionally, APC contends the new policy unlawfully requires employees to cooperate in discrimination investigations.

In determining whether a party has violated HEERA section 357l(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

I. Scope of Representation

APC contends the CSU violated the HEERA when it unilaterally adopted the 1997 Policy and the Draft Discrimination Policy. However, the charge fails to demonstrate the first prong of the test for unilateral change; that the decision to adopt the policy is within the scope of representation. It is undisputed that policies that protect employees from unlawful discrimination are within the scope of representation. (See, Jefferson School District (1980) PERB Decision No. 133; San Mateo City School District (1984) PERB Decision No. 375.) However, this policy does not serve to protect employees from discrimination, but seeks to protect student and unrepresented employees. As such, the above cited cases are inapplicable.

This case is more appropriately analyzed under Compton Community College District (1990) PERB Decision No. 798, which addresses public and student complaints against bargaining unit members. In Compton, the district unilaterally adopted a student grievance policy that allowed students to file complaints against certificated employees. The outcome of these complaints were placed in the employees' personnel file. In finding that the complaint procedure was within the scope of representation "because it sets up a procedure whereby an employee's performance in a particular situation is evaluated" the Board further held:

> That we based this finding on the policy's requirement that student complaints and/or administrative determinations resulting from student complaints are placed in the personnel file of the employee charged. (Id at 3.)

As such, in order for the Discrimination Policy to be a negotiable subject under Compton, the initial complaint and/or administrative determination must be placed in the employee's personnel file. Without such action, it cannot be said that an employee's performance will be evaluated. A review of the 1997 Policy and the Draft Discrimination Policy indicates that the complaint and corrective action plan remain confidential. There is no mention of such

[4] APC provides no support for the contention that employees have been allowed to unlawfully discriminate against students while engaged in off-campus University activities.

complaints being placed in the personnel file. Moreover, Article 11 of the MOU contains a detailed provision regarding the placement of materials in an employee's personnel file. Therefore, under the Compton analysis, the student policy fails to state a prima facie violation of the HEERA.

Although not raised by APC, the union could also argue that because the student discrimination policy could result in discipline to a bargaining unit member, the policy is a negotiable subject. It is again undisputed that disciplinary procedures and policies are within the scope of negotiation. (Arvin Union School District (1983) PERB Decision No. 300.) Indeed, the parties have already negotiated a comprehensive progressive discipline policy that governs actions from written and oral reprimands, to suspension and dismissal. (Article 12 of the MOU.)

While the adoption of a federally mandated policy may not be negotiable, the impact of the procedure may be negotiable. However, the charge fails to present any negotiable disciplinary impact.[5] The 1997 Policy and the Draft Discrimination Policy state any and all discipline arising from the policy will follow contractual guidelines. Moreover, the policy does not subject employees to a new work rule, as discriminatory conduct has been considered unlawful and unprofessional under Education Code 89535 which pertains to CSU employees.[6] As such, the adoption of the Discrimination Policy does not violate the HEERA.

Finally, APC contends the two policies do not provide for employee representation, and thus violate the HEERA. However, as the policy applies to student complaints against employees, the policy is silent with regard to employee representation. However, Article 12.3 and Article 10.1 of the MOU specifically provide for union representation during disciplinary procedures. As such, the policy's failure to mention employee representation does not constitute a unilateral change.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the

[5] The MOU contains a contractual zipper clause prohibiting CSU from implementing a new policy. However, as noted above, there is no duty to bargain the decision to implement the policy, and as such the zipper clause is inapplicable.

[6] Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes: (a) Immoral conduct, (b) Unprofessional conduct, (c) Dishonesty, (d) Incompetency, (e) Addiction to the use of controlled substances. (f) Failure or refusal to perform the normal and reasonable duties of the position. (g) Conviction of a felony or conviction of any misdemeanor involving moral turpitude. (h) Fraud in securing appointment. (i) Drunkenness on duty.

charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 7. 2003. I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR